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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO VELAZQUES PONCE,

Defendant and Appellant.

D035365

(Super. Ct. No. SCN053030)

APPEAL from a judgment of the Superior Court of San Diego County,  
Timothy M. Casserly, Judge. Affirmed.

STATEMENT OF THE CASE

Pursuant to an information filed on June 29, 1999, and an amended information filed on November 22, 1999, the San Diego County District Attorney charged defendant Ricardo Velazques Ponce with forcible rape in violation of Penal Code<sup>1</sup> section 261, subdivision (a)(2), against Leidy M. on October 23, 1995. It was further alleged that

defendant engaged in tying or binding the victim within the meaning of section 667.61, subdivisions (b), (c), (e)(6). Additionally, it was alleged that he was previously convicted on December 18, 1992, of forcible rape in violation of section 261, subdivision (a)(2), and assault to commit rape in violation of section 220 on or about December 9, 1991, thereby qualifying him as an habitual sex offender within the meaning of section 667.71.

On December 6, 1999, defendant was found guilty as charged and found the special allegations true. On March 17, 2000, the court sentenced defendant to prison for the base term of 25 years to life for forcible rape (§ 261, subd. (a)(2)), tripled to 75 years to life under the three strikes law. The court included two five-year enhancements for defendant's prior convictions (§ 667, subd. (a)) and stayed imposition of sentence with respect to the habitual sexual offender (§ 667.71) and prior prison commitment (§ 667.5, subd. (b)) enhancements, making the total aggregate term 85 years to life.

Ponce filed a timely notice of appeal on March 21, 2000, contending (1) reversible error resulted from jury misconduct, (2) the court erred in instructing the jury regarding his prior sexual offenses, (3) prejudicial error resulted from prosecutorial misconduct during closing argument and (4) the trial court abused its discretion when it denied his motion to strike his previous strikes. We conclude appellant's contentions are without merit and accordingly affirm the judgment.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

## FACTS

On October 22, 1995, Leidy M. spent the night at her mother's home in Escondido. She was sleeping in a room with her sister, brother and two-year-old son when appellant entered the bedroom at approximately 4:00 a. m. through an unlocked sliding glass door. Leidy, afraid of upsetting her mother, kept appellant in the bedroom until all members of her family left the house at which point Leidy asked appellant to leave.

Leidy knew appellant for five years prior to October 22, 1995. She dated him in the year preceding the rape and became engaged to him at one point. Leidy broke the engagement several months earlier and on October 23, 1995, reiterated her desire to dissolve the relationship entirely. In the midst of this conversation, appellant grabbed Leidy by the arms and legs and carried her from the living room to the bedroom against her will. Leidy began to struggle with appellant when she realized he was not joking. He then tied her hands behind her back with a sock and forcefully held her down. Appellant pulled down her shorts and underwear, pulled down his own pants and raped her. When she screamed, appellant grabbed a nearby pair of shorts and shoved them in Leidy's mouth. Afraid that she would suffocate, Leidy agreed to stop screaming if appellant would remove the clothing from her mouth.

Eventually, Leidy was able to free her hands from the sock and push appellant off her. She ran out of the room and called 911. Upon learning of the telephone call, appellant fled the home through the sliding glass door at the rear of the bedroom. Escondido police arrived within a few minutes. Leidy gave the police a statement and was taken to Pomerado Hospital for a medical examination.

Nurse Sandra Steveson conducted the Sexual Assault Response Team examination of Leidy. Steveson testified to finding bruising and swelling of Leidy's hymeneal area and three abrasions located in her vagina. Based on the physical findings and oral interview, Steveson concluded Leidy's injuries were consistent with rape.

Sometime after October 23, 1995, appellant absconded to Texas where he worked and held a driver's license under the alias "Efrain Meza Dealba." At the request of Escondido detectives, Dallas County Sheriff's Deputy Gary Lachman arrested appellant on January 29, 1999, in connection with the charges related to the October 23, 1995, incident with Leidy M.

This is appellant's third sexual assault conviction. Luz M. testified to a crime committed by appellant in 1991. Appellant crawled through the kitchen window of the home Luz shared with her sister sometime after 9:00 p.m. Appellant entered Luz's bedroom and closed the door. The noise of the closing door awakened Luz who looked up to see a person coming quickly toward her. Appellant kneeled on Luz's back and told her "Don't move." The two thrashed about on the bed until both fell to the ground. At that point Luz saw that her assailant was wearing a nylon over his face and began screaming. The screaming awakened Luz's three-year-old child who started to cry. Perhaps fearing the noise would awaken Luz's sister in the other room, appellant ran from the room and fled the home through the back door.

In 1992, appellant raped Lupe C. who was 14 years old at the time. Appellant arrived at Lupe's apartment when she was alone with her four-month-old son and asked to use the telephone. Lupe, not wanting her parents or appellant's girlfriend to discover

him in the apartment, asked appellant to leave after making his telephone call. Ignoring Lupe's requests that he leave the apartment, appellant carried Lupe to her room against her will. He laid her on the bed, got on top of her and forcefully removed her clothes while holding her hands above her head. Again, ignoring Lupe's pleas to stop, appellant proceeded to rape her.

## DISCUSSION

### I

Appellant contends reversible error resulted from jury misconduct and the trial court erred in denying his motion to release the names and addresses of jurors for further investigation into facts to support a motion for new trial.

#### *A. Jury Misconduct*

In determining the validity of a verdict based on jury misconduct, a rebuttable presumption of prejudice is raised. (*People v. Nesler* (1997) 16 Cal.4th 561). The court applies the objective standard of the substantial likelihood test in deciding whether a particular verdict must be overturned due to jury misconduct. (*In re Hitchings* (1993) 6 Cal.4th 97, 118.) Any presumption of prejudice is rebutted, and the verdict will not be disturbed if a review of the entire record, including an evaluation of the surrounding circumstances and extent of the misconduct, reveals there is no substantial likelihood one or more jurors were actually biased against the defendant. (*In re Hamilton* (1999) 20 Cal.4th 273.)

This standard is "mindful of the 'day-to-day realities of courtroom life' [citation] and of society's strong competing interest in the stability of criminal verdicts." (*In re*

*Hamilton, supra*, 20 Cal.4th at p. 296, citing *Rushen v. Spain*, (1983) 464 U.S. 124, 118-119). Realizing the fundamentally human aspect of the jury system, the personal knowledge and beliefs jurors bring to deliberations and the inherent weaknesses therein, we must be willing to tolerate that amount of imperfection, which falls short of actual bias if the jury system is to function at all. (*In re Carpenter* (1995) 9 Cal.4th 634, 654-655.)

Here, appellant's brother Rogelio Velazques Ponce overheard a conversation between three jurors in which one juror stated appellant "had done this before and he shouldn't get away this time." This took place "in the hall by the snack bar." Appellant's counsel believed the conversation occurred after closing argument. Accordingly, the jurors were in possession of all the evidence, including evidence of appellant's prior sex crimes (in compliance with Evid. Code, § 1108), and were instructed to consider the evidence of prior sexual offenses only for the purpose of determining his disposition to commit the same or similar type sexual offenses.

Applying the aforementioned test, and assuming the accuracy of defendant's brother's declaration, the juror's statement presents a recognizable irregularity but does not rise to the level of prejudicial misconduct. The conversation among jurors regarding the facts of the case in an area outside the deliberation room was a clear violation of the trial court's instructions. The nature of the comment, however, was innocuous in that it comprised one juror's thoughts about evidence properly in the consideration of the jury with no reference to extraneous material. We must also consider the timing of the incident. Had this event occurred at an earlier stage in the trial, such that it suggested a

likelihood of bias, counsel would have a duty to request an admonishment to cure any prejudice. Its placement at the end of the trial, however, aligns more closely with a mere lack of discretion on the part of the juror. Such a misgiving will be tolerated as one of the many human frailties inherent in the jury system, which does not present a substantial likelihood of bias against appellant.

Further, "jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case." (*Conservatorship of Early* (1983) 35 Cal.3d 244, 253.) We keep this presumption in mind when considering the effect of the incident on other jurors. The trial court instructed appellant's jury not to be influenced by prejudice against the defendant and the jury is presumed to have followed that instruction. A review of the entire record in light of the surrounding circumstances does not show a substantial likelihood of actual bias against appellant. Reversible error, therefore, did not occur due to jury misconduct.

#### *B. Personal Information On Jurors*

Code of Civil Procedure section 237, subdivision (a)(2), provides that upon the recording of a verdict in a criminal jury proceeding, the court's record of personal juror identifying information, consisting of names, addresses and telephone numbers, shall be sealed until further order of the court pursuant to section 237, subdivision (b), any person may petition the court for access to these records provided the petition is supported by a declaration of good cause. This declaration must contain "a sufficient showing to support a reasonable belief jury misconduct occurred, diligent efforts were made to contact the jurors through other means and that further investigation was necessary to provide the

court with adequate information to rule on a motion for new trial." (*People v. Wilson* (1996) 43 Cal.App.4th 839, 850, citing *People v. Rhodes* (1989) 212 Cal.App.3d 541, 553-554.)

In compiling information to be used in ruling on a motion for new trial, "any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (Evid. Code, § 1150, subd. (a).) Thus, "when a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419.) An exception to the exclusion of juror statements exists only where the statement itself amounts to juror misconduct, such as an admission of consulting an outside attorney on relevant law. (*People v. Lewis* (2001) 26 Cal.4th 334, 389, citing *In re Stankewitz* (1985) 40 Cal.3d 391, 398.)

Here, the trial court's denial of appellant's petition for the release of juror information is based on a finding that appellant failed to show good cause. The record substantiates this finding. There is no evidence in the record to show the statement itself amounted to juror misconduct, as stated in our above decision. Furthermore, questioning of the jurors about the alleged statement could only serve to uncover the effect such



statement had on their mental processes -- an investigation specifically barred by Evidence Code section 1150. Absent a satisfactory showing of possible juror misconduct, and restricted by the limitations of Evidence Code section 1150, the trial court did not err in its denial of appellant's petition for the release of juror information. The strong public interest in the integrity of our criminal justice system and a juror's right to privacy bolsters this decision.

## II

Appellant contends the trial court prejudicially erred by instructing the jury pursuant to CALJIC No. 2.50.01(1999 rev.) in relation to appellant's prior sexual offenses and argues the court abused its discretion in allowing evidence of appellant's prior sexual offenses to be presented to the jury.

### *A. Prejudicial Error in Jury Instructions*

The court instructed the jury pursuant to CALJIC No. 2.50.01 (1999 rev.):  
"Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case.

"'Sexual offense' means a crime under the laws of a state or of the United States that involves any of the following:

"A. Any conduct made criminal by Penal Code section 261 (a)(2). The elements of this crime are set forth elsewhere in these instructions.

"B. Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person.

"C. Contact, without consent, between the genitals or anus of the defendant and any part of another person's body.

"D. An attempt or conspiracy to engage in specific sexual conduct identified in subparagraphs A, B, and C herein.

"If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to infer that he was likely to commit and did commit the crime of which he is accused.

"However, if you find by a preponderance of the evidence that the defendant committed prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime. The weight and significance of the evidence, if any, are for you to decide.

"Unless you are otherwise instructed, you must not consider this evidence for any other purpose."

The California Supreme Court specifically endorses the use of CALJIC No. 2.50.01 (1999 rev.), stating this instruction "contains language appropriate for cases involving the admission of disposition evidence" (*People v. Falsetta* (1999) 21 Cal.4th 903, 922) and "adequately sets forth the controlling principles under [Evid. Code] section 1108" (*id.* at p. 924). CALJIC No. 2.50.01 (1999 rev.) provides proper guidelines within which to consider evidence properly admitted under Evidence Code section 1108. More importantly, it contains admonitions that a preponderance of evidence as to the prior

offenses is not sufficient to prove the commission of the charged crime and the use of prior offense evidence is to be used for the sole purpose of inferring defendant's disposition to commit the same or similar type crimes. These aspects of the instruction "help assure that the defendant will not be convicted of the charged offense merely because the evidence of his other offenses indicates he is a 'bad person' with a criminal disposition." (*Id.* at p. 920.)

Here, appellant argues the use of CALJIC No. 2.50.01 "paved a prejudicial path that was severely detrimental to the Appellant." This analysis ignores the admonishments and limitations expressly stated in the instruction, which help "to assure that the defendant will be tried and convicted for his present, not his past, offenses." (*People v. Falsetta, supra*, 21 Cal.4th at p. 923). Additionally, the trial court augmented its use of CALJIC No. 2.50.01 (1999 rev.) with further instructions on the People's burden to prove the truth of all prior sexual offense allegations and to prove the defendant guilty beyond a reasonable doubt for the charged crime. Considering the instructions as a whole, it is clear appellant's jury was properly instructed and the trial court took all precautions to ensure appellant a fair trial.

#### *B. Abuse Of Discretion In Admission Of Evidence*

Inherent in appellant's contention of instructional error lies an argument that the trial court abused its discretion in admitting the evidence relating to his prior sexual assaults.

In 1995, the Legislature enacted section 1108 of the Evidence Code with the intention of allowing the trier of fact to consider a defendant's prior sexual offenses in its

evaluation of the defendant's credibility. (*People v. Falsetta, supra*, 21 Cal.4th at p. 911.) The "Legislature declared that the willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness." (*Review of Selected 1995 Cal. Legislation* (1996) 27 Pacific L.J. 761, 762, fn. omitted.) The author of the legislation further states that section 1108 ""permits courts to admit such evidence on a common sense basis -- without a precondition of finding a 'non-character' purpose for which it is relevant -- and permits rational assessment by juries of evidence so admitted. This includes consideration of the other sexual offenses as evidence of the defendant's disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant had been falsely or mistakenly accused of such an offense."" (*People v. Falsetta, supra*, 21 Cal.4th at p. 912.)

Evidence Code section 1108 reads in pertinent part: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

Evidence Code section 352 in turn reads: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues or of misleading the jury."

The *Falsetta* court provides a detailed analysis of the constitutionality of Evidence Code section 1108, which supports its "conclusion the provision does not offend due

process." (21 Cal.4th at p. 916). The safeguard provided by the imposition on trial courts to weigh the evidence using such factors as its inflammatory nature, remoteness, likelihood of confusion, consumption of time and probative value, lends additional support to the constitutionality of Evidence Code section 1108. (*Ibid.*). Trial courts are presumed to exercise sound discretion in this evaluation and we will not upset their rulings as long as there exists a reasonable justification, under the law, for their actions.

The record in appellant's case demonstrates the trial court diligently applied the factors outlined by the *Falsetta* court in its determination of the admissibility of appellant's prior sexual offenses. Rather than admitting all evidence of appellant's prior conduct, the trial court ruled to admit two sexual offenses and exclude a third. Specifically, it chose to admit evidence of a 1991 assault with intent to commit rape perpetrated against Luz M. and of a 1992 forcible rape committed against Lupe C. Recognizing the striking similarities between these crimes and that of the charged offense, the court engaged in a thorough Evidence Code section 352 analysis looking at factors of inflammatory nature, probability of confusing the jury, remoteness, consumption of trial time and probative value. Only after concluding the proffered evidence did not violate any aspect of this test did the trial court rule to admit this evidence under Evidence Code section 1108.

The court excluded evidence of a prior offense committed against Christina A. on grounds that presenting the evidence would require an undue consumption of time and its probative value was insufficient to warrant admittance. Of particular concern to the trial court was the question of guilt as it related to this crime. Whereas appellant's guilt was

unquestioned in the other two cases, due to convictions in both, the trial court recognized "some slight probability of confusion in this case" based on the lack of a conviction and, therefore, ruled to exclude the evidence. This ruling is further evidence the trial court was not acting arbitrarily but rather well within its sound discretion. Hence, there is no indication of an abuse of discretion and the trial court did not err in admitting evidence of appellant's prior sexual offenses.

### III

Appellant contends the district attorney's reference to appellant's prior sexual offenses in closing argument constituted prosecutorial misconduct, which prevented appellant from receiving a fair trial.

The principal function of a closing argument is to persuade the jury. In furtherance of that goal, "prosecutors have wide latitude to suggest inferences that may be drawn from the evidence presented at trial, and whether the inferences are reasonable is generally a matter for the jury to decide." (*People v. Silva* (2001) 25 Cal.4th 345, 374-375, citing *People v. Dennis* (1998) 17 Cal.4th 468, 522.) Thus, to support a contention of prosecutorial misconduct, appellant must show either a pattern of egregious conduct or employment of persuasion methods so deceptive as to create a reasonable likelihood that such behavior prejudicially affected the jury. (*People v. Ochoa* (1998) 19 Cal.4th 353,427.)

Here, the district attorney was entitled to argue the evidence that was properly admitted under Evidence Code section 1108. The emphasis placed on that evidence is entirely in the discretion of the prosecutor. The evidence presented to the jury included

both the crime against Luz and the crime against Lupe. The district attorney understandably attempted to demonstrate the similarities between these crimes and the charged offense. His argument regarding appellant's learning curve with respect to each of the prior offenses is directly in keeping with the Legislature's intent in allowing such evidence to be admitted under Evidence Code section 1108. The intent is to show a propensity to commit the same or similar type crimes. The prosecution's argument focused on appellant's propensity to commit forcible rape against Leidy, not on the certainty of future actions as suggested by appellant.

Appellant also takes exception to discussion of his criminal packet, including sentencing dockets and probation status. This, however, is not inflammatory but rather may serve to reduce the prejudicial impact of the prior offense evidence. Knowledge of actual convictions and time served alleviates the jury's temptation to convict the defendant in order to punish him for the other offenses and focuses their attention on determining proof of the charged offense. (*People v. Falsetta, supra*, 21 Cal.4th at p. 917.)

The complained of misconduct is restricted to the district attorney's comments in summation. It does not, therefore, demonstrate a pattern of egregious conduct likely to infect the trial proceedings. Likewise, there is no evidence of deception. The prosecution presented one interpretation of the evidence. The jury is entitled to determine the reasonableness of any inferences intrinsic to such an explanation. Nothing in the record supports an allegation that the prosecution exceeded its bounds in presenting

closing argument and there is no indication any statement had a prejudicial effect on the jury.

#### IV

Appellant contends the trial court abused its discretion during his sentencing hearing when it denied a request to strike his prior convictions.

"A court's discretion to strike allegations of prior felony conviction under the three strikes law [citation] in furtherance of justice is limited." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530.) It must weigh the interests of the defendant and the interests of society as represented by the prosecution. (*Ibid.*). The court may consider such factors as the nature and circumstances of the present felony and the prior felonies along with the defendant's background, character and prospects in determining whether the defendant falls outside the scheme of the three strikes law such that justice may be better served by imposing a sentence irrespective of his prior convictions. (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

"On appeal, two additional precepts operate: 'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the



judgment of the trial judge." [Citations.]' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

Here, appellant's jury convicted him of a forcible rape committed in 1995. The record reveals appellant's prior convictions: infliction of corporeal injury on a spouse/cohabitant in 1990, assault with intent to commit rape in 1992 and forcible rape in 1993. During much of the time between his last conviction in 1993 and the present offense, which occurred in 1995, appellant served time in prison.

The trial court's consideration of the factors set forth in *Williams* is clearly shown in its determination that appellant did not fall outside the scheme of the three strikes law. Appellant does not meet his burden to show that such decision was irrational or arbitrary by merely citing conflicting testimony already decided by the jury. While a reasonable person may disagree with the trial court's decision, this is no basis for reversal.

#### DISPOSITION

The judgment is affirmed.

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BENKE, J.

WE CONCUR:

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KREMER, P. J.

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HALLER, J.